

Application No. : 10/679,963
Amdt. Dated : September 1, 2004
Reply To O.A. Of : June 2, 2004

REMARKS

The Applicants thank the Examiner for his careful and thoughtful examination of the present application. By way of summary, Claims 1-10 were pending in this application. In the present amendment, the Applicants have amended the drawings to include reference numerals from the specification, supplied formal drawings, canceled Claims 1-10 without prejudice or disclaimer, and added new Claims 11-23. Accordingly, Claims 11-23 remain pending for consideration.

Priority

The Applicants note that the Office Action Cover Sheet did not indicate acknowledgement of a claim for domestic priority under 35 U.S.C. § 119(e) as indicated on Page 1, Paragraph No. [0002] of the instant specification. The Applicants respectfully request such indication in a subsequent Office Action.

Drawing Amendments

The Applicants are submitting herewith new formal drawings where Figs. 1-3 include appropriate reference numbers from the specification. Please note that any amended drawing sheet includes all of the figures appearing on the immediate prior version of the sheet.

The Applicants respectfully submit that no new matter is introduced by the proposed drawing changes.

Rejections Under 35 U.S.C. § 102

The Office Action rejected various combinations of the prior pending claims under 35 U.S.C. § 102 as being anticipated by U.S. patent no. 6,061,584, issued to Lovejoy et al. (the Lovejoy patent), or U.S. patent no. 4,802,485, issued to Bowers et al. (the Bowers patent). The Applicants respectfully submit the cited art fails to identically teach every element of new Claims 11-23. See M.P.E.P. § 2131 (stating that in order

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to anticipate a claim, a prior art reference must identically teach every element of the claim).

For example, independent Claims 11 recites, among other things,

An optical probe capable of outputting a signal indicative of light transmitted through body tissue, the optical probe comprising:

- one or more emitters . . .;
- detector circuitry . . .;
- a probe housing including a first positioning . . .;
- one or more protruding emitter lenses protruding from the probe housing;
- one or more protruding detector lenses protruding from the probe housing;
- a protruding optical barrier protruding from the probe housing between the one or more protruding emitter lenses and the one or more protruding detector lenses . . .; and
- an attachment mechanism . . . wherein attachment of the attachment mechanism to the body tissue positions the probe housing against the body tissue with sufficient pressure to noninvasively recess the protruding optical barrier into the body tissue and to noninvasively recess the one or more protruding emitter lenses and the one or more protruding detector lenses into the body tissue substantially along a plane thereof.

In contrast, the Lovejoy patent discloses a conventional sensor having an emitter and detector module 10, which is attachable to a finger through adhesive pad 14. See Figs. 1, 3 and 5. The emitter and detector module 10 include emitters 22, 24 and detector 28 encapsulated within body 15 of module 10. Figs. 3 and 5 of the Lovejoy patent clearly teach that module 10 includes a flat planar surface that is wrapped around the finger.

Accordingly, the Applicants submit that the Lovejoy patent fails to teach or suggest every element of new Claim 11. Moreover, Fig. 3 of the Bowers patent discloses a SaO₂ sensor 18 having only LEDS 56 and a photodetector 58 mounted within the disclosed housing thereof. Thus, the Applicants also submit that the Bowers patent fails to teach or suggest every element of new Claim 11. Thus, the Applicants submit that the cited prior art fails to anticipate new Claim 11.

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Independent Claim 19 recites, among other things,

Claim 19. (New) A pulse oximetry system capable of increasing the accuracy of the determination of one or more physiological parameters of a patient, the pulse oximetry system comprising:

an oximeter comprising a memory capable of storing a plurality of calibration curves, wherein the calibration curves comprise corrective information usable by the oximeter to correct determined values of one or more physiological parameters based on a signal received from the an optical probe that includes at least one emitter capable of emitting light at about a first predetermined wavelength;

an optical probe including an emitter capable of emitting light at about a second predetermined wavelength different from the first predetermined wavelength

In contrast, the Lovejoy and Bowers patents each fail to disclose or suggest an optical probe with properties different from those expected by the oximeter. Accordingly, the Applicants submit that the Lovejoy and Bowers patents fail to teach or suggest every element of new Claim 19. Thus, the Applicants submit that the cited prior art also fails to anticipate new Claim 19.

Additionally, Claims 12-18, which depend from Claim 11, are believed to be patentable over the cited prior art for the same reasons articulated above with respect to Claim 11, and because of the additional features recited therein. For example, the claims recite, among other things, a pressure applicator, the applicator comprising a convex member, indicia, the indicia comprising ruler-like indicia, and a positioning member centered within the adhesive tape.

Moreover, Claims 20-23, which depend from Claim 19, are believed to be patentable over the cited prior art for the same reasons articulated above with respect to Claim 19, and because of the additional features recited therein. For example, the claims recite, among other things, properties of the optical probe and various selection factors for the second predetermined wavelength.

Rejection Under 35 U.S.C. § 103

The Office Action rejected prior pending Claims 1, 5 and 9 under 35 U.S.C. § 103 as being unpatentable over U.S. patent no. 4,380,240, issued to Jobsis et al., (the

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Jobsis patent) in view of the Lovejoy patent. The Applicants submit the Jobsis patent, alone or in combination with the Lovejoy patent, fails to teach or suggest the elements of new Claims 11-23. See M.P.E.P. § 2143 (stating that in order to establish a *prima facie* case of obviousness for a claim, the prior art references must teach or suggest all the claim limitations).

Fig. 1 of the Jobsis patent shows a body mountable light source detector apparatus 20 having fiber optic bundles 80 and 83, which transmit light to and from the apparatus, that are recessed within module support 35. Even if the Jobsis patent could be combined with the Lovejoy patent, which it should not, the Jobsis patent and the Lovejoy patent fail to teach or suggest all the limitations of new Claims 11-23.

Accordingly, the Applicants submit that the cited prior art fails to render obvious any of the new claims.

Request For Telephone Interview

In view of the forgoing, the present application is believed to be in condition for allowance, and such allowance is respectfully requested. If further issues remain to be resolved, the Applicants' undersigned attorney of record hereby formally requests a telephone interview with the Examiner. The Applicants' attorney can be reached at (949) 721-2946 or at the number listed below.

In addition, please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: September 1, 2004

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Attachments

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